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No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN D. ASHCROFT, UNITED STATES ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The decisions of the Eleventh Circuit in this case and the predecessor case on which it relied, *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), were based on an interpretation of 18 U.S.C. § 16 that is contrary to the interpretations by a majority of circuits that have considered the issue -- specifically, whether DUI offenses involving injury are crimes of violence. Respondents have not addressed the rationale of those decisions that support the interpretation petitioner advocates, nor have they endorsed the reasoning of the *Le* decision or other courts that have adopted a contrary approach. Without acknowledging the split among the circuits on the interpretation of the phrase "use of physical force against" in § 16, respondents engage in close linguistic analysis of the word "use" to support the proposition that crimes of violence do not require intentional conduct. This exercise, petitioner submits, is one of

obfuscation and not clarification of the issue before the Court.

The cases that address § 16(a)'s applicability to DUI offenses either state summarily that § 16(a) is clearly inapplicable, *see e.g. United States v. Lucio-Lucio*, 347 F.3d 1202, 1203 (10th Cir. 2003); *Francis v. Reno*, 269 F.3d 162, 166 (3d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609 (7th Cir. 2001), or provide little analysis as to why it should apply to DUI offenses. *See Le,* 196 F.3d 1352; *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision). There are, however, numerous cases that have considered whether DUI offenses (ranging from simple DUI to DUI manslaughter) qualify as crimes of violence under § 16(b) or the analogous language in the Sentencing Guidelines. *Compare United States v. Vargas-Duran,* 356 F.3d 598 (5th Cir.) (en banc), *cert. denied*, 124 S. Ct. 1728 (2004) and *pet. for cert. pending* No. 03-1514 (filed May 7, 2004); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *Bazan-Reyes,* 256 F.3d 600*; with Omar v. INS*, 298 F.3d 710 (8th Cir. 2002). Respondents have all but ignored these decisions and their interpretation of the concept of "use of physical force." Without confronting the reasoning of the courts that have concluded that the intentional use of physical force is a requirement for a crime of violence under § 16, respondents assert that the use of physical force may, but will not necessarily, involve intentional conduct.

By engaging in narrow linguistic analysis regarding what the word "use" means and whether certain scenarios constitute the "use of physical force against" a person or property, respondents have failed to consider § 16's context -- that is, it was enacted to classify offenses as "crimes of violence" not just to provide a catch-all definition for almost any offense. Respondents have also ignored the implications

of the position they advocate. Adoption of respondents' interpretation of § 16 would improperly expand the term "crime of violence" to cover certain offenses that require only negligent conduct. That, in turn, would lead to their classification as aggravated felonies, subjecting an individual to mandatory and permanent removal from the United States based on conviction for an offense that might involve only criminal negligence and a suspended sentence of one year. Petitioner submits that such a result is not consistent with Congressional intent.

Finally, respondents have not categorically demonstrated that all convictions under Fla. Stat. § 316.193(3)(c)(2) require proof of the "use of physical force." Therefore, the fact that the "use of physical force" is not "an element" of this offense, as required by § 16(a), is yet another reason why petitioner's offense is not a "crime of violence" under § 16.

ARGUMENT

I. IN THE CONTEXT OF 18 U.S.C. § 16, "USE OF PHYSICAL FORCE" REFERS TO INTENTIONAL CONDUCT

A. The Plain and Ordinary Meaning of "Use" Connotes Intentional Action, Not an Accident

Respondents have cited certain dictionary definitions of "use" that arguably do not include an intent element as support for their argument that "use" does not have a *mens rea* component. Resp. Br. at 13-15. In so doing, respondents ignore the importance of determining Congressional intent regarding § 16's meaning by applying, first and foremost, the plain and ordinary meaning of the statute's text. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Because almost any word

will have more than one dictionary definition and thus may have more than one meaning, Congress is presumed to use a word with its most commonly accepted meaning. *See Bailey v. United States*, 516 U.S. 137, 143-45 (1995) (stating that "the word 'use' poses some interpretational difficulties because of the different meanings attributable to it" but then applying the "ordinary and natural" meaning); *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 301 (1989) (discussing other ways the word "request" may be used, but noting "[t]here is little reason to think that Congress did not intend [for the word] to bear its most common meaning").

Respondents effectively acknowledge that the definitions of "use" relied on by petitioner indicate that "use" ordinarily refers to intentional rather than accidental conduct. Resp. Br. at 13. Respondents emphasize this fact by noting dictionary definitions of "use" that mean to put something into service "*especially* to attain an end" and "*usu[ally]* for an intended . . . purpose." *Id.* (emphasis in original). Therefore, even according to respondents, "use" normally and ordinarily involves intentional or non-accidental conduct, though not necessarily all the time.

But respondents then go further. Based on selected definitions from different dictionary editions, respondents assert that "one could reasonably infer . . . that the employment of something for a purpose is not even the *primary* definition of 'use,' much less the sole one." Resp. Br. at 14 (emphasis in original). This argument highlights respondents' narrow approach to § 16. As an initial matter, the argument misconstrues petitioner's position: not that "use" always and everywhere refers to intentional conduct, but that the "ordinary and common" understanding of the word "use" in this statutory context (*see* § I.B., *infra*)

supports the conclusion that "use" means intentional conduct in § 16.[1]

Moreover, the argument that the primary definition of "use" does not include intent lacks merit for two reasons. First, at least one of the dictionary definitions respondents cite includes an element of intent. Respondents cite the third definition from *Webster's Third New International Dictionary* stating that "use" means "to put into action or service." Resp. Br. at 14. Putting something into "service" naturally and commonly is understood to include intent. People do not ordinarily obtain a service from something accidentally. Second, the *primary* definition of "use" in many dictionaries involves "purpose" and, thus, intent. For example, respondents focus on the sixth and seventh definitions of the verb "use" from the *Oxford English Dictionary* (Resp. Br. at 14), but they ignore the *first definition* of the noun "use" from that same dictionary (both the version in effect today and as of 1984) which is: "[t]he act of employing a thing for any (esp. a profitable) purpose." *The Oxford English Dictionary* 350 (2d ed. 1989); *The Oxford English Dictionary* 468 (1978). Respondents also ignore the first definitions of the noun and verb "use" in *The American Heritage Dictionary* (both the current version and the one in effect in 1984), which include employing something for a purpose, thus connoting intent. *The American Heritage Dictionary* 1894 (4th ed. 2000); *The American Heritage Dictionary* 1410 (1981).

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[1] Respondents imply that petitioner believes that "use" must be interpreted to involve intent in every circumstance, no matter the context, such that "use" could never be meant to include accidental conduct. Resp. Br. at 17-18. This is, of course, not the case. Petitioner's brief makes clear that the ordinary meaning of "use" requires intent, not that "use" always does so. Moreover, this argument is made in the context of § 16's specific language and context, not in the context of defining "use" for all purposes or contexts.

In sum, although not every dictionary definition of the noun or verb "use" includes an intent component, the proper focus is on whether the common, ordinary and everyday meaning of "use" does. *See generally Muscarello v. United States*, 524 U.S. 125, 130-31 (1998) (noting that "carry" has "other meanings" but focusing on the "ordinary" meaning of the word); *Mallard*, 490 U.S. at 301 (the fact that the word "request" may be used in various ways, does not change its "ordinary and natural signification"). Under this standard, "use" connotes intentional conduct, especially given the statutory context.

B. The Statutory Context Supports a Reading of "Use" with a *Mens Rea* Component

Respondents contend that there is no basis for limiting the interpretation of the word "use" in § 16 to intentional conduct, and that narrowing the conduct "use" encompasses by requiring a particular mental state must be expressly specified in the statute (*e.g.*, "accidental use," "intentional use" or "willful use"). Resp. Br. at 20. Because "use" can encompass both intentional and accidental conduct with an appropriate modifier, respondents assert that the word is not limited to intentional conduct unless that mental state is expressly specified in the statute, and note that there is no such specification in § 16. *Id.* Respondents recognize that there may be an exception to the asserted "requirement" that *mens rea* be specified in the statute if "the context indicates otherwise," *id.*, but they have taken no account of the statutory context under consideration, *i.e.*, whether DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) is a "crime of violence" under § 16.

In *Bailey v. United States*, this Court noted that understanding what Congress meant by the term "use" depends in part on the statute in which the word appears. ""Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the

sentencing scheme, to determine the meaning Congress intended." 516 U.S. at 143. Because § 16 categorizes certain types of crimes -- violent crimes -- it therefore excludes from the definition certain types of conduct that may nevertheless be criminal. Put another way, not every crime is a "crime of violence." The concept of a "crime of violence" is not a common law term, but was introduced into the federal criminal code through the Comprehensive Crime Control Act of 1984 to designate a category of serious crimes based on the physical force involved. Pub. L. No. 98-473, § 1001(a), 98 Stat. 1837, 2136 (1984). The term referred to certain crimes designated as particularly severe that would subject perpetrators to harsher treatment. *See e.g. United States v. Lucio-Lucio*, 347 F.3d 1202, 1205 (10th Cir. 2003) (referring to crimes of violence as "especially heinous offenses"). The legislative history cites to the following offenses as examples of what would constitute a crime of violence for each subsection of § 16: for subsection (a), assault, and for subsection (b), burglary. S. Rep. No. 98-225, at 307, (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3486-87. Both of these clearly involve intentional conduct.

Section 16's statutory context indicates that the force required for a crime of violence must be violent in nature, and that criminal negligence does not suffice. *See Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000) (alien's conviction for vehicle burglary did not constitute a crime of violence because, following the categorical approach, the physical force needed to enter a locked car with intent to commit a theft is not necessarily violent in nature). Similarly, in *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992) (Breyer, J.) the court held that a conviction for being a "felon in possession of a firearm" did not constitute a "violent felony" for purpose of sentence enhancement because simple possession of a firearm, even by a felon, takes place in a variety of ways, many of which do not involve likely accompanying violence. "There is no reason to believe

Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, 'violent felony' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.* at 225.

Here, the statutory context strongly indicates that the term "use of physical force" must be an intentional use of force. One can cause injury to the person or property of another as a result of operating a vehicle while under the influence of alcohol in a manner that is not violent in nature. Many types of accidents resulting from driving under the influence, *e.g.*, running a stop sign or crossing into another lane, entail the application of physical force against the person or property of others, but it would be anomalous to label such accidents as violent crimes.

Further context supporting an intent requirement is provided by the inclusion of "attempted use" and "threatened use" in § 16(a). Respondents' argument that even though "attempted use" and "threatened use" involve intentional conduct, simple "use" need not (Resp. Br. at 22-23), is strained and unpersuasive. The suggestion that petitioner's interpretation of § 16(a) would not accommodate the concept of felony murder is not only wrong, but beside the point. Felony murder is a concept of liability for a death that is an unintended result, but proximately caused by felonious conduct. Even though the death may not be intended, liability is attributed to the felon when his conduct is the proximate or legal cause of the death. It does not mean that the death was the result of negligent conduct. For example, an arsonist who sets fire to a house resulting in the death of an inhabitant could be charged with felony murder even though he did not intend to kill anyone when he set the fire. Thus, to recognize the natural similarity in meaning from the

parallel construction in § 16(a) in no way undermines the viability of the concept of felony murder.

Even when it is possible to refer to the accidental or inadvertent use of something (Resp. Br. at 17-18),[2] the ordinary and common meaning of the word in its statutory context should govern unless clearly specified otherwise. There is a "distinction between how a word *can be* used and how it *ordinarily is* used." *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (emphasis in original). As a result, it is of little value in interpreting § 16 to consider, as respondents have, other statutes in which "use" is modified by "intentional" and then argue that "use" in § 16 must be accompanied by a modifier to refer to intentional conduct. Resp. Br. at 18-19 & n.10. The focus is on the ordinary meaning of "use" in the context of § 16.

Moreover, the majority of statutes cited by respondents refer to the "willful" use of something, not "intentional" use. Resp. Br. at 19 & n.10. A statute that specifies "willful" use implies a separate element of knowledge regarding the character or source of the thing being "used" in addition to the purposeful availment of the proscribed thing itself. One of respondents' examples, 18 U.S.C. § 708, penalizes those who "willfully use[] as a trade mark, commercial label, or portion thereof . . . the coat of arms of the Swiss Confederation." The prohibited conduct is

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[2] Respondents maintain that the concept "use of physical force" does not necessarily include an intent requirement because the idea of "accidental use of force" is plausible, relying on decisions of the Illinois Court of Appeals and a statutory definition under New York law. Resp. Br. at 18. In fact, the term used by the Illinois court appeared as "an accidental [use of force]," quoting from an earlier Illinois case in which the bracketed phrase replaced the word "shooting," and was used as a contrast to use of force in self-defense, not to describe a negligent use of force or use of force without intent. *People v. Purazzo*, 420 N.E.2d 461, 467 (Ill. App. Ct. 1981), *cited in People v. Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992) and *People v. Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986).

not merely the use of the white-on-red design (which clearly is done intentionally and not accidentally), but the use of the design with the knowledge that it represents the Swiss coat of arms. Similarly, 18 U.S.C. § 1543, which provides criminal penalties for those who "willfully and knowingly use[] . . . any . . . false, forged, counterfeited, mutilated, or altered passport," prohibits the act of using a false passport with the knowledge that the document is forged.

The few statutes cited by respondents that prohibit "intentional" use are also distinguishable. These frequently reflect the use of a thing with the separate purpose of achieving some other goal. For example, respondents cite 21 U.S.C. § 843(b), which makes it unlawful "intentionally to use any communication facility in committing or in causing or facilitating the commission of" a drug offense. Resp. Br. at 19 & n.10. The prohibited conduct is not, for instance, the use of a telephone (which, of course, is an intentional act), but the use of that telephone with the purpose of facilitating a drug transaction. *See United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994) (per curiam) ("What is essential is that the defendant knows that he or she is using the communication device to facilitate the drug transaction"). Respondents also cite 18 U.S.C. § 2511(1)(b), which imposes criminal liability on "any person who . . . intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication." As the legislative history makes clear, "'[i]ntentional' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective." S. Rep. No. 99-541, at 23-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577-79. As a result, "intentionally" requires proof that an individual charged under this statute had the conscious objective to intercept oral communications when he turned on a device; *i.e.*, it excludes those who intentionally turn on a device for some

purpose other than to intercept communications, but nonetheless do intercept them. Given these statutes' differing contexts, they do not change the fact that "use" in § 16 means intentionally applying force.

Respondents' position that "use" encompasses accidental conduct results in a situation in which crimes that require nothing more than negligence and injury for conviction (§ 16(a)), or felonies that pose a substantial risk that someone will be injured through negligence (§ 16(b)), qualify as crimes of violence. Respondents acknowledge that an offense under Fla. Sta. § 316.193(3)(c)(2) involves negligence "at the very least." Resp. Br. at 21. Under this interpretation of "crimes of violence," individuals who have committed offenses that may only involve negligence would be classified as aggravated felons and become permanently removable from the United States on that basis if their sentence was one year. No other offense on the extensive list of aggravated felonies involves a *mens rea* of mere negligence or even recklessness. *See* 8 U.S.C. § 1101(a)(43)(A)-(E), (G)-(U).

II. "USE OF PHYSICAL FORCE" IS NOT AN ELEMENT OF FLA. STAT. § 316.193(3)(c)(2), NO MATTER HOW "USE" OR "FORCE" ARE DEFINED

Respondents do not dispute that for a given offense to satisfy § 16(a)'s "element" requirement, a conviction for that offense must require proof of the "use, attempted use, or threatened use of physical force against the person or property of another." Moreover, they do not contest that, under the categorical approach, the Court looks not to the actual conduct underlying a conviction, but rather to the elements required by the statute at issue. Finally, they do not seem to contest that, as a result of these two requirements, an offense is a "crime of violence" under § 16(a) only if the minimum conduct necessary to maintain a conviction under

that statute includes the "use of physical force against the person or property of another." *See United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir.) (en banc), *cert. denied*, 124 S. Ct. 1728 (2004) and *pet. for cert. pending* No. 03-1514 (filed May 7, 2004) (interpreting the identical "element" language from the Sentencing Guidelines and finding that "[i]f any set of facts would support a conviction without proof of [the component in question, *e.g.*, use of physical force] then the component most decidedly is not an element -- implicit or explicit -- of the crime."); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-96 (2d Cir. 2003) (offense is not a "crime of violence" under § 16(a) when the elements of the offense at issue could be satisfied without force being used). Respondents nevertheless assert, without any apparent support, that "[w]hen a drunk driver causes serious bodily injury with his vehicle, he has necessarily used physical force." Resp. Br. at 24. This argument lacks merit for a number of reasons.

First, respondents offer nothing to establish, as they must, that a conviction under Fla. Stat. § 316.193(3)(c)(2) always requires proof of, or necessarily entails, some use of physical force against the person or property of another (no matter how "use" or "force" is defined). Rather, respondents dismiss as "atypical" the real-world examples petitioner and his amici describe, and try to explain how those situations involve the use of physical "force." Resp. Br. at 25-27. Respondents' attempts to sweep those situations under the "use of force" umbrella are unpersuasive. For example, it strains all bounds of ordinary English to contend, as respondents do (Resp. Br. at 27), that someone who stops his or her car on a highway "uses force against" any person who happens to run into that car. Simply because the same legal responsibility may attach from hitting a person with your car and from placing your car where someone may hit it (Resp. Br. at 27), does not mean that both acts involve "using" force.

Moreover, it is not enough to argue that two posited hypotheticals may involve "force." Respondents ignore other real-world situations that could support a conviction under Fla. Stat. § 316.193(3)(c)(2), but involve no force whatsoever. For example, Fla. Stat. § 316.193(3)(c)(2)'s elements of being intoxicated, operating a motor vehicle and causing injury would be satisfied without "force" being used when: (i) an intoxicated driver is operating a four-wheel vehicle off-road; the vehicle never runs into anything but rather gets stuck in the mud in such a way that the tailpipe is submerged leading to carbon monoxide poisoning of the occupants, *see Weese v. Schukman*, 98 F.3d 542, 545-46 (10th Cir. 1996) (describing serious injuries suffered as a result of carbon monoxide poisoning that occurred after an off-road vehicle's tailpipe became submerged in water); or (ii) an intoxicated driver pulls off a street into an alley that runs next to an apartment building, stops his car next to the building's ventilation system and then he falls asleep with the engine running causing occupants to suffer carbon monoxide poisoning. *See Late Local News Briefs*, S. Bend Trib., Aug. 21, 2002 at 2, *available at* 2002 WL 24745065 (describing evacuation of building and serious health effects due to carbon monoxide coming into a building from a car parked outside).

Second, respondents' argument essentially equates "causing injury" (a result or effect) with "using force" (an action or cause). Respondents do not explain how the difference between injury and force (as exemplified by the contrast between § 16(b) and the Sentencing Guidelines (Pet. Br. at 30-34)) can be reconciled under their interpretation of the statute. If Congress intended to focus on the effect of an individual's conduct (injury) as opposed to the cause (use of force) it could have written § 16 in terms of "injury to others" and not "use of physical force against" others.

III. THE LEGISLATIVE HISTORY OF BOTH § 16 AND § 1101(h) SUPPORT THE CONCLUSION THAT DUI CAUSING INJURY TO OTHERS IS NOT A CRIME OF VIOLENCE

Respondents do not argue that § 16's legislative history (related to both its enactment and its incorporation into 8 U.S.C. § 1101(h)) supports their expansive interpretation of § 16. Rather, they attempt to demonstrate that the history does not unconditionally support petitioner's interpretation. This attempt is based on an unfairly narrow parsing of § 16's legislative history that ignores what is obvious from a fair reading of that history (Resp. Br. at 23-24 & n.12), and on nothing more than speculation about Congressional intent in enacting § 1101(h). Resp. Br. at 33-37. These arguments are unpersuasive.

A. Section 16

Respondents' review of § 16's legislative history focuses on whether the offenses listed as "crimes of violence" in the District of Columbia Court Reform and Criminal Procedure Act of 1970 ("DC-CRCPA"), Pub. L. No. 91-358, § 210(a), 1970 U.S.C.C.A.N. (84 Stat.) 764, included the offenses that the 98th Congress understood were the types of offenses that § 16 covered; offenses that respondents tacitly concede require intent but do not include DUI offenses. The legislative history reflects Congress' understanding that the offenses covered by § 16 are "essentially the same categories of offenses" listed in the DC-CRCPA as "dangerous crimes" and "crimes of violence." S. Rep. No. 98-225, at 20-21, (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203-04. Respondents attempt to cloud Congress' intent by noting that the above statement was made with regard to pretrial detention hearings under 18 U.S.C. § 3142(f)(1), not § 16. Resp. Br. at 23-24 & n.12. This argument ignores that as part of this same legislation that enacted § 16, Congress added a definition of "crime of violence" to the definition section in 18 U.S.C. § 3156(a). Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 203(a), 1001(a), 98 Stat. 1837, 1985, 2136 (1984). That definition was for use in § 3142(f)(1) and is substantially identical to the text of § 16. *See* 18 U.S.C. § 3156(a); *Lucio-Lucio*, 347 F.3d at 1205. Therefore, Congress' reference to the categories of crimes found in the DC-CRCPA's definitions of "dangerous crimes" and "crimes of violence" when discussing the definition of "crimes of violence" to be used in § 3142 applies with full force to § 16. Respondents' distinction is, therefore, meritless.[3]

B. Section 1101(h)

Further insight into Congress' intent as to whether DUI offenses involving injury are covered by § 16 comes from the 101st Congress' differentiation between § 16 and DUI offenses involving injury within 8 U.S.C. § 1101(h) (which defines "serious criminal offense"); a differentiation it made just nine months before adding "crime of violence" under § 16 to the list of "aggravated felonies" in 8 U.S.C.

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[3] Respondents also note that the legislative history states that the term "crime of violence" refers to the definitions of both "dangerous crimes" and "crimes of violence" in the DC-CRCPA. Resp. Br. at 23-24 & n.12. However, the reference to "dangerous crimes" does not change the conclusion that Congress did not intend for DUI offenses, or other crimes that may involve accidental causation of injury, to be covered by § 16. "Dangerous crimes," as defined in the DC-CRCPA, cover offenses that involve an intent or willingness to apply force or do violence. *See Lucio-Lucio*, 347 F.3d at 1205. Moreover, any suggestion that the phrase "essentially the same" indicates that Congress intended § 16 to cover accidental offenses such as DUI offenses should be rejected. This statement is most reasonably read to reflect Congress' understanding that there could be other specific offenses similar in type to those identified in the DC-CRCPA as "crimes of violence" or "dangerous crimes" that would be covered by § 16. It is not reasonably read to exhibit Congressional intent to extend the definition to cover radically different offenses (*i.e.*, accidental or unintentional acts).

§ 1101(a)(43). Pet. Br. at 34-36. Respondents assert that the 101st Congress' understanding of offenses covered by the "crime of violence" definition is not relevant to interpreting § 16 (Resp. Br. at 34-35) and pose hypotheticals implying that Congress *might* have included DUI involving injury as a separate subsection from "crimes of violence" within § 16 and yet still believed that the latter included the former (Resp. Br. at 35-36). Neither argument should be accepted.

Although respondents assert the oft-cited principle that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (Resp. Br. at 34-35), that principle does not apply in this case. Petitioner does not rely on the later views expressed by individual legislators towards the meaning of § 16, nor on any amendments to § 16 as evidence of original Congressional intent. Rather, turning to a subsequent statute, § 1101(h) -- which passed through the rigors of the formal legislative process and specifically incorporated § 16 -- is a useful method of statutory interpretation that illuminates the intent of the Congress that passed § 16. Viewed in this context, the language of § 1101 is not a "hazardous basis" for interpreting § 16, but rather reveals the intent of the earlier Congress and thus should be accorded "great weight." *See, e.g., Loving v. United States*, 517 U.S. 748, 770 (1996) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (citations omitted); *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969).

Recognizing that statutes should be interpreted to eliminate superfluous terms, respondents also posit an extreme hypothetical attempting to show that DUI offenses involving injury can qualify as "crimes of violence" under § 16 (and thus be covered by § 1101(h)(2)), without being redundant of § 1101(h)(3). Resp. Br. at 35-36. As respondents concede, this hypothetical depends on (i) states

not having statutory offenses criminalizing DUI resulting in injury, or (ii) situations where such a statute exists, but an offender is charged with a lesser offense. *Id.* This technical parsing of what might be possible lacks merit because there is no evidence to support it. Nothing suggests Congress added § 1101(h)(3) because some states did not have specific statutory offenses covering DUI involving injury or there was a concern that DUI incidents involving injury were not being charged as such, but rather as lesser offenses.

Respondents further hypothesize that Congress added subsection (h)(3) because Congress may have been unsure whether courts would interpret § 16 to include such DUI offenses involving injury and wanted to ensure that such offenses were considered "serious criminal offenses." Resp. Br. at 36-37. In addition to being nothing more than speculation,[4] this argument reinforces petitioner's point. Even if respondents' speculation is correct, had Congress also wanted DUI offenses involving injury to be "aggravated felonies," it could have incorporated the definition of "serious criminal offense" from § 1101(h) into § 1101(a)(43) rather than "crime of violence" under § 16 when it added § 16 to the list of "aggravated felonies" in § 1101(a)(43) just nine months after enacting § 1101(h). That, however, is not what Congress actually did.[5]

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[4] Respondents cite *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) to support their argument that the redundancy between § 1101(h)(2) and (h)(3) under respondents' interpretation of § 16 can be excused. Resp. Br. at 36-37. *Mackey*, however, does not support respondents' position. In *Mackey*, there was evidence that Congress was aware of conflicting court opinions addressing the statute at issue. *See Mackey*, 486 U.S. at 838-39 & n.13-14. However, there is no comparable evidence in this case.

[5] Petitioner submits the rule of lenity need not be invoked in this case because the plain and ordinary meaning of the term "use of physical force against," together with its statutory context demonstrate that intentional application of force is required under § 16. However, if the

CONCLUSION

The order of the court of appeals should be vacated and the court of appeals should be directed to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

Respectfully submitted,

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Court is still uncertain about whether Congress intended § 16 to cover unintentional offenses such as DUI involving injury, the rule of lenity should be applied. Contrary to respondents' assertion (Resp. Br. at 37 & n.17), no heightened level of ambiguity is required before the rule applies. Rather, as this Court unanimously observed, the rule of lenity applies "if after considering traditional interpretive factors, [the Court is] left genuinely uncertain as to Congress' intent." *Castillo v. United States*, 530 U.S. 120, 131 (2000).

